

Draft Six-Month Progress Report from MAFAC's ESA Working Group

May 2013

Preface: At the May 6, 2013 meeting of the ESA Working Group, members approved this final progress report. In the same meeting, members reviewed the draft work product of a matrix summarizing the timing, pros, and cons of various options for improving communication with Councils during ESA Section 7 reviews. This work-in-progress-matrix differs in some details from the options listed in the progress report and remains fluid as the ESA Working Group discusses the feasibility of various options.

I. Formation of the Working Group and Development of Terms of Reference

- In January 2012, the Council Coordinating Committee (CCC) identified the two goals of improving collaboration, and identifying options for improving communication and increasing transparency in the ESA jeopardy determination process for fisheries management actions.
- In May, 2012, the CCC and MAFAC requested establishment of a joint working group (working group) to make recommendations on increasing transparency and improving confidence in ESA consultations on fishery management plans.
- In October 2012, NMFS established a Working Group composed of 4 Council Members, 4 MAFAC Members, and 3 NOAA Fisheries Staff.
- ***The Terms of Reference define the purpose of the Working Group: Convene a working group under the authority of the Marine Fisheries Advisory Committee (MAFAC) to increase confidence in the science and process used for Section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions.***
- The Working Group helped to organize and participated in a webinar held on October 24, 2012. The webinar presented different case studies that highlighted best practices and potential areas for improvements in ESA consultations on MSA fishery management actions.

II. Prioritization

The Working Group Developed Priorities for Discussion and Areas of Agreement and Disagreement during January 2013

- In January working group members responded to a survey indicating areas of agreement and disagreement and high priority topics for discussion.
- Areas of highest agreement:
 - Protected Resources should coordinate with Councils early in the development of FMPs
 - Protected Resources discussions with Councils should begin early, before formal consultation begins

- We should determine the best timing for Protected Resources to share information about fishery impacts with Council and Sustainable Fisheries and the best timing for Council and Sustainable Fisheries to share information with Protected Resources about special features of the fishery
- Protected Resources should discuss “Best Available Information” with the Council early in the process to identify data weaknesses strategies to address these weaknesses.
- Areas of majority agreement:
 - Protected Resources should communicate a “Jeopardy Bar” to Councils and SF early in the process with clear guidance on actions that would meet the “no jeopardy” standard.
 - Strive for stakeholder understanding of data and analysis methods used in the biological opinion.
 - Review NOAA 2005 Draft Operating Guidelines for suggestions on consultations related to fishery management guidelines
 - Clarify the legal and regulatory constraints on communication between Protected Resources and Councils during consultation
 - Consider using consistent data sources and analyses for single Protected Species that occur across several regions
 - Define standards and levels of “Best Available Data” used in Biological Opinions.

III. Meetings and Meeting Notes

- An initial face-to-face meeting with a subset of Working Group Members was held the morning following the Webinar in October 2012. Since then, there have been three conference call meetings (January, February, March) and one face –to-face meeting (May). The following paragraphs summarize the concepts preliminarily identified as potential options, and include comments about potential effectiveness. It is important to note that more formal information is being developed to follow-up on these concepts in the form of a comparative matrix. Before recommendations can be finalized, it will be necessary to develop more specific information about how and whether these concepts would work and/or under what circumstances they would be available.

A. Options Proposed and Discussed for Early Informal Consultation

- Issues raised by Working Group Members
 - PR’s formal consultation and Biological Opinion (BiOp) comes pretty late in the process.
 - Formal Protected Resources (PR) consultation begins once the Council chooses a preferred alternative.
 - However, Councils want to know which alternatives will avoid jeopardy before choosing a preferred alternative.
 - Communication about protected species among Sustainable Fisheries (SF), Council, and PR during the development of alternatives in Fishery Management Plans (FMPs) will increase the likelihood that the action will avoid jeopardy.
- Draft options for early, informal consultation among SF, Councils, and PR, under discussion

1. SF as Action Agency includes Council in informal discussions with PR during development of alternatives. ESA Section 7(a) 1 and 7(a) 2 are times when an action agency can engage with the Office of Protected Resources (PR) to develop alternatives.
2. SF as Action Agency designates Council as a Non-Federal Representative, which allows Council to engage in early conversation with PR about alternatives. Non-federal Representatives are often the entities responsible for preparing NEPA documents, already a Council role. SF as Action Agency and Council as Non-Federal Representative can assist PR in developing the draft Biological Assessment (BA) or NEPA document allowing major protected species issues to be worked out at the same time that alternative actions are being shaped. Councils could be designated as a Non-Federal Representative for a particular fishery.
3. PR staff participate in Interdisciplinary Plan Teams (IPT) for FMPs. The Southeastern Regional Office uses this model. PR, SF, and Council are kept in the communication loop and can prevent problems later in the FMP process. On the IPT, PR can exchange information on the effects of various alternatives on protected species prior to the Council selection of a preferred alternative. However, PR staff are time and resource limited, and participation in early discussions for every amendment may not be feasible. When an alternative action is likely to affect a protected species, PR should be included as early as possible. However, sometimes the Council rewrites alternatives very late in their FMP process requiring new analysis of effects on protected species and the potential for jeopardy. New England and Mid Atlantic Councils have planning teams, but the role of the PR staff appears to be more limited in these regions. The 2005 Draft Operational Guidelines call for Fishery Management Action Teams that would include SF, Council, and PR. The recent Department of Commerce Inspector General Report on Fisheries calls for NMFS to finalize the Draft Operational Guidelines.
4. Each Council and regional SF office could identify specific points in their FMP Amendment process when regional PR staff would be brought in for informal consultation and discussion of potential alternatives.
5. ESA regulations set out a process for early consultation and preliminary Biological Opinions.
6. 2005 Draft Operational Guidelines proposed a "Consultation Assessment" process – a formal written memo that summarizes analyses and preliminary conclusions that will form the basis of a Biological Opinion.

B. Options Proposed and Discussed for Council Participation During Formal Consultation

• Issues Raised by Working Group members.

- When the need for formal PR consultation, BiOp, and Reasonable and Prudent Alternatives (RPAs) is based on new biological information or settlement of litigation, there is no clear process for including the Council in the consultation. Lacking a defined process, there have been instances where Council science and management expertise has been sidelined, leading to animosity among Council, SF, and PR – entities that should work collaboratively.

- The lack of direct involvement of the Councils in the ESA Section 7 consultation process can result in an inefficient and inconsistent application of the ESA to actions proposed by the Councils under the MSA.
- The lack of Council integration into the ESA Section 7 can result in the Council and PR having different understanding and expectations regarding the choice of Best Available Scientific Information for the basis of the BiOp.
- A process that includes the Council in formal consultations could improve the overall efficiency of the consultation and evaluation processes under the ESA, MSA, and National Environmental Policy (NEPA).
- In the absence of the early informal consultation methods described above, the Council may choose a preferred alternative action that creates jeopardy for a protected species.
- The jeopardy determination will be based on the BiOp, and the Council and its science advisory committee (SSC) will want assurance that the BiOp is based on Best Available Scientific Information.
- The Council can provide management expertise in deliberations about RPAs, if they become necessary.
- Formal consultations sometimes involve USFWS in addition to PR.
- Draft options for Council involvement in formal consultations under discussion by the Working Group
 1. A draft option has not yet been developed for including Council expertise in formal consultations that arise outside of normal FMP development (from litigation settlements or new biological information).
 2. Councils could become an Action Agency during the formal consultation. As an action agency, the Council could work more directly with SF and PR to develop more integrated biological assessments and National Environmental Policy Act (NEPA) documents, to review draft biological opinions, and ultimately, to develop fishery management actions that comply with the MSA, ESA, and NEPA. However, Department of Justice (DOJ) and NOAA General Counsel (NOAA GC) maintain that the Council is not the Action Agency. This protects the Council and Council members from litigation that challenges FMP amendments.
 3. Councils could be designated as Applicants during the formal consultation. Applicants can submit information for consideration in the consultation, have to concur when timelines are extended beyond 60 days, can review the draft Biological Opinion (BiOp) and provide comments through the Action Agency, can provide expertise on Reasonable and Prudent Actions (RPAs), and get a copy of the final BiOp. However, NOAA GC does not consider Councils eligible to be Applicants.
 4. SF could choose to solicit public involvement through the Council process when developing comments on draft BiOps. If SF were to do this, it would likely require a time extension for the consultation. The ESA Consultation Handbook allows the Action Agency (SF) to support participation of a party that may not fit the definition of an applicant and states that PR should try to work with that party.

C. Options Proposed and Discussed for a Data Quality Rating Scale for Biological Opinions

- Potential advantages and disadvantages discussed by the Working Groups of a scale to rate quality of Best Available Scientific Information used in Biological Opinions.
 - PR staff currently follows statutory standards and the Data Quality Act for information used in the Biological Opinions. PR uses a hierarchy when they seek and use information. Professional scientific judgment is used if there is conflicting or competing information. PR uses published information and may use unpublished data or other information that is available (such as monitoring data) and then submits its draft BiOp to a Quality Control(QC) process to ensure it meets “Best Available Scientific Information” standard.
 - The Working Group is discussing whether standards to rate quality of evidence used in the BiOp would improve transparency and credibility. Data quality models used in medical research may be adapted for use in BiOPs. However prescribing a rigid scoring of data quality may be problematic.
 - PR staff are sometimes required to develop BiOps for protected species with limited published knowledge. In these situations a data quality model might indicate that the best science was of low quality. Nevertheless, PR staff would need to produce a BiOp based on limited knowledge, while acknowledging data limitations. Sometimes a better-understood surrogate species can be used in the BiOp analysis. Early acknowledgement by SF and PR that a surrogate species will need to be used will be helpful to all parties.
 - Consistent application of a data quality evaluation could highlight particular research needs for particular protected species. This would signal research priorities to NOAA and other research enterprises and, over time, improve scientific knowledge of protected species.
- What are the draft options for a scale to rate quality of Best Available Scientific Information used in Biological Opinions?
 - Options are still being developed by the Working Group.

D. Note that a comparative matrix is being developed to more thoroughly describe the options for council involvement. The full details of these options are still being developed and the feasibility of these options has not been reviewed with the necessary parties.

Plans and next steps

- Discuss progress report and draft options with MAFAC, CCC, and NOAA Fisheries in early May, 2013
- Integrate new ideas and comments from MAFAC, CCC, and NOAA Fisheries into draft options.
- Add detail to options and review feasibility with necessary parties.
- Develop recommendations.
- Schedule additional conference calls for July and August.
- Final report with recommendations in October 2013.

Appendix 1. Draft Matrix of Options for Improving Communication with Councils during ESA Section 7 Review.